

rejection lacks statutory support because the rejection is dependent on alleged facts which are not in the prior art. The Examiner acknowledges that a) the prior art does not disclose or suggest the specific chewing gum products claimed by applicants and b) the processes disclosed in the prior art, as described, are not even capable of making the claimed products. The Examiner addresses these voids by alleging that the prior art processes could be modified, or that the claimed products could be made by hand. However, there is nothing in the prior art which suggests, or provides motivation for, these alleged process variations.

For instance, the Examiner alleges that the claimed products could be made merely by cutting products made by the prior art processes in different ways. Even if this were true (which it is not, as discussed below), the Examiner has pointed to no motivation or suggestion in the prior art to make such a change.

The prior art also does not suggest making the claimed chewing gum by hand. To the contrary, the prior art teaches (and it is well known) that effective chewing gum manufacture requires the ingredients to be in a soft or molten state, ie., at elevated temperatures. Chewing gum at these temperatures would stick to, and possibly burn, a human hand.

In summary, the § 103 rejection lacks statutory support because a) the prior art of record provides no motivation or means for modifying the disclosed processes to make possible the manufacture of claimed products, b) the Examiner has provided no reference which suggests making the claimed products by hand, and c) the art of record suggests to the contrary that chewing gum is made at temperatures high enough to possibly injure human skin.

Second, even if the facts alleged by the Examiner were in the prior art, the Examiner has still relied on improper hindsight to arrive at the claimed products. For instance, even if the prior art suggested the process variations relied on by the Examiner, the Examiner has still provided no motivation (apart from the applicants' specification) to make the claimed products using the processes so modified. The Examiner did not use the prior art as a starting point, or show how it leads to the claimed invention. Instead, the Examiner used the applicants' specification and claims as the starting point, and worked backwards into the prior art, filling any voids in the art with speculation of what could have been done by hand, or what might have been done had the disclosed process been different. Such a hindsight-based analysis does not provide proper foundation for an obviousness rejection.

Third, even if the prior art process were modified as suggested by the Examiner, to cut the extruded chewing gum masses in different ways, the disclosed extruded masses would not yield the claimed chewing gum products. Independent 1 recites that the second mass a) is embedded in the first mass, b) so as to be visible with the first mass from the top surface of the chewing gum product, and c) the first mass only is visible from the bottom surface of the chewing gum product. Support for these limitations is provided, for instance, in Fig. 2 which shows a continuous phase of first mass 13 directly underneath and on both sides of second mass 15. Also, it is clear from the process diagrams (Figs. 8, 9 and 11, for instance) that the second mass is embedded only in the top surface, and not the bottom surface, of the first mass. Further support is provided at page 5, lines 17-24. Independent claim 51 requires that a

rope of second mass is a) embedded in a slab of first mass, b) in an undulating pattern, as illustrated in Figs. 1 and 13, for instance.

Referring to the Lorenz reference, twelve extruded masses are disclosed in Fig. 7, in cross-section. The extruded masses are produced continuously in the downward vertical direction, and the cross-sections shown are in the horizontal direction, perpendicular to the direction of extrusion. None of the twelve extruded masses could yield the claimed products regardless of how they are cut. In ten of the twelve cross-sectional diagrams, quantities of second mass are embedded in, and visible from, opposing surfaces of the first mass, contrary to claim 1. In the remaining two cross-sectional diagrams, the second mass is extruded side-by-side with the first mass, and is not embedded in the first mass, contrary to claim 1. Also, none of the diagrams suggests the undulating pattern recited in independent claim 51.

Referring to Cherukuri et al, as explained in previous office action responses, this reference discloses a) a side-by-side coextrusion of two or more layers, and b) a process wherein two ropes are twisted or braided together, and then pressed. As to the coextruded products, there is no suggestion of embedding a second mass in a first mass, so that both are visible from a top surface of the product. As to the products of the twisted rope method, both masses would be visible on both opposite surfaces of the product. Again, the products of claim 1 would not result from the disclosed processes, regardless of the cutting techniques employed.

The Examiner also mentioned BEECHNUT<sup>®</sup> gum in support of the obviousness rejection. A known BEECHNUT<sup>®</sup>

product, which is made by a competitor of applicants, is acknowledge and discussed on page 1, last paragraph of applicants' specification. As best understood, BEECHNUT® is merely a standard chewing gum product having colored stripes printed with a dye on its outer surfaces. In other words, that product does not involve embedding a second mass in a first mass, as recited in applicants' claims. Applicants further note that different BEECHNUT® products are sold. The Examiner has not been specific as to which product he is referring, or whether such product is prior art.

In conclusion, the obviousness rejection of claims 1-6, 8, 15-19, 21, 28, 51-54 and 56 should be withdrawn for the following reasons:

- 1) The alleged facts on which the Examiner is relying, including the hand-making of chewing gum and specific cutting techniques, are not in the prior art;
- 2) The Examiner has not used the prior art as a starting point, but has instead relied on improper hindsight by using applicants' specification as the sole motivation for the claimed invention, and couched the rejection in terms which face backwards into the prior art; and
- 3) Even if the prior art processes were modified as proposed by the Examiner, the claimed products would not result from these processes.

Withdrawal of the § 103 rejection, and passing of  
the case to allowance, are respectfully requested.

Respectfully submitted,

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